

No. 12-2220 BN

We sustain the State Board of Nursing’s (“the Board”) decision to issue a probated license to Candice Evans, but reduce the period of probation to 9 months from her licensure.

On December 17, 2012, Evans filed a complaint appealing the Board's decision to issue her a probated license. On April 11, 2013, we held a hearing on the complaint. Angela S. Marmion represented the Board. Evans represented herself. The matter became ready for our decision on May 3, 2013, the date the transcript was filed.

1. In 2011, Evans was accepted into nursing school at the Cape Girardeau Career and Technology Center. She graduated on September 20, 2012.

2. On June 11, 2012, the Board received Evans' application for licensure as a Licensed Practical Nurse ("LPN").

3. By letter dated August 31, 2012, the Board informed Evans that she was approved to take the licensure examination (“the NCLEX”) and that, if she passed, she would be issued a probated license.

4. The Board’s Order of the State Board of Nursing Regarding Issuance of a Probated License to Candice Evans (“the order”) placed Evans on probation for a period of three years beginning on the date the Board received information that Evans passed the NCLEX. The Board’s order stated that Evans pled guilty to possession of marijuana, between 5 and 50 pounds, but did not state that adjudication of the case was deferred.

5. Evans passed the examination, and was licensed by the Board (subject to the terms of probation) on November 19, 2012.

6. Evans worked as a General Practice Nurse, and when she was licensed, as an LPN at Lutheran Home in Cape Girardeau, Missouri. She had informed this employer that she had not been convicted of a drug charge because adjudication was deferred and then dismissed. Her employer read the Board’s order, which referenced the guilty plea but not the deferred adjudication, and fired her for submitting false information.

Criminal Offenses

7. On April 20, 1999, in the Circuit Court of Pettis County, Missouri (“the Court”), Evans pled guilty to the Class A misdemeanor of passing bad checks. She was fined \$50.50.

8. On March 14, 2000, in the Court, Evans pled guilty to the Class A misdemeanor of passing bad checks. She was sentenced to 30 days in the county jail, with execution of the sentence suspended. She was placed on two years’ probation.

9. On June 20, 2000, in the Court, Evans pled guilty to the Class A misdemeanor of passing bad checks. She was sentenced to 30 days in the county jail, ordered to spend 2 days as shock incarceration, with execution of the remaining sentence suspended.

10. On May 18, 2009, Evans possessed marijuana, a controlled substance.¹

11. On May 13, 2010, in the District Court of Hopkins County, Texas (“the Texas Court”), Evans pled guilty to the 3rd degree felony of possession of marijuana between five and fifty pounds. On May 13, 2010, the Texas Court issued an Order of Deferred Adjudication “defer[ing] proceedings without entering an adjudication of guilty and [placing] Defendant on community supervision.”²

12. On April 3, 2013, the Texas Court issued an order entitled “Early Release & Order Dismissing Deferred Proceedings” dismissing the proceedings against Evans and discharging her from community supervision.³

Evans’ Rehabilitation

13. Evans completed her community service in a timely manner, and had positive comments from her community supervisor. Drug tests performed during her supervision have been negative.

14. As a condition of her supervision, Evans received treatment at the Gibson Treatment Center, an outpatient treatment center that provided counseling and classes.

15. Evans has formed a strong support group, and discusses problems with others.

16. Evans has been drug and alcohol free since 2010.

Conclusions of Law

We have jurisdiction to hear Evans’ complaint because she seeks our review of the decision to issue a probationary license.⁴ The agency’s answer provides notice of the grounds

¹ Marijuana is a schedule I controlled substance pursuant to § 195.017.2(4)(w). Statutory references, unless otherwise noted, are to the 2012 Supplement to the Revised Statutes of Missouri.

² Respondent’s ex. E. The Board’s attorney stated that this appeared to be similar to Missouri’s drug court system. Tr. at 10.

³ Petitioner’s ex. 3.

⁴ Section 621.045.

for issuing the probated license.⁵ The Board has the burden to prove the basis for imposing probation.⁶

I. The Board's Order

We order the Board to amend its order to reflect that adjudication was deferred pursuant to Evans' guilty plea in the Texas Court, and that on April 3, 2013, the Texas Court issued an order entitled "Early Release & Order Dismissing Deferred Proceedings" dismissing the proceedings against Evans and discharging her from community supervision. The Board shall update its website and take any other action to amend its order within ten days of the date of this decision.

II. Cause to Issue a Probated License

Section 324.038 provides:

1. Whenever a board . . . may refuse to issue a license for reasons which also serve as a basis for filing a complaint with the administrative hearing commission seeking disciplinary action against a holder of a license, the board, as an alternative to refusing to issue a license, may, at its discretion, issue to an applicant a license subject to probation.

The Board argues that there is cause to impose probation under § 335.066:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use or unlawful possession of any controlled substance, as defined in Chapter 195, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

⁵ *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App., E.D. 1984).

⁶ *Id.*; § 324.038.

(2) The person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution pursuant to the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated pursuant to sections 335.011 to 335.096, for any offense an essential element of which is fraud, dishonesty or an act of violence, or for any offense involving moral turpitude, whether or not sentence is imposed;

(14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

A. Subdivisions (1) and (14) – Unlawful Drug Possession

The Board argues that Evans violated a drug law and unlawfully possessed a controlled substance. She pled guilty to violating § 481.121 V.T.C.A., a Texas drug law. By possessing marijuana, she also violated Missouri law, § 195.202.1:

Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.

Evans is subject to discipline under § 335.066.2(1) because she unlawfully possessed a controlled substance – marijuana. She is subject to discipline under § 335.066.2(14) for violating drug laws. There is cause to issue a probated license.

B. Subdivision (2) – Guilty Pleas

The Board argues that there is cause to issue a probated license because Evans pled guilty to passing a bad check, an offense essential elements of which are fraud and dishonesty. An essential element is one that must be proven for a conviction in every case.⁷ Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable

⁷*State ex rel. Atkins v. Missouri Bd. of Accountancy*, 351 S.W.2d 483, 485 (Mo. App., K.C.D. 1961).

thing belonging to him.⁸ It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive.⁹

Evans pled guilty on three occasions to the crime of passing bad checks under the 2000 version of § 570.120:

1. A person commits the crime of passing a bad check when:

(1) With purpose to defraud, he makes, issues or passes a check or other similar sight order for the payment of money, knowing that it will not be paid by the drawee, or that there is no such drawee; or

(2) He makes, issues, or passes a check or other similar sight order for the payment of money, knowing that there are insufficient funds in his account or that there is no such account or no drawee and fails to pay the check or sight order within ten days after receiving actual notice in writing that it has not been paid because of insufficient funds or credit with the drawee or because there is no such drawee.

Passing bad checks requires either a purpose to defraud or knowing that there are insufficient funds when writing a check. A purpose to defraud is self-evident of fraud and dishonesty. Writing a check with knowledge that there are insufficient funds is a perversion of the truth that misleads the payee into believing there are sufficient funds, which is essentially a disposition to defraud. Therefore, both possible elements of this crime require a disposition to defraud. We find that passing bad checks contains the essential elements of fraud and dishonesty.

Evans is subject to discipline under § 335.066.2(2). There is cause to issue a probated license.

⁸ *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910).

⁹ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

III. Discretion

This Commission may alter the terms of probation.¹⁰ Evans' convictions for passing bad checks date back to 1999 and 2000, more than 13 years ago. There has been no reoccurrence of this behavior, and we would not hesitate to issue an unrestricted license if those were the only issues. But Evans' possession of an illegal, controlled substance and guilty plea associated with that conduct were more recent. Evans was only released from probation three months ago. Many of the Board's conditions in the order of probation, such as drug screens, are clearly designed to address the marijuana possession and guilty plea for that conduct. Evans admitted that she used marijuana at that time in her life.

Evans states that she has been receiving drug tests for the entire three years she was on probation, and has always tested negative. She testified about the many changes she has made in her life, and counseling she received for substance abuse. Evans states that she has been taking care of patients in hospitals as part of her curriculum in nursing school, and asks that we adjust the three-year probationary period to begin when she began nursing school. The Board argues that, by placing her on probation for three years rather than five years, it already considered the time Evans has remained drug free.

We agree that probation is appropriate. Evans is a nurse, and part of the duties of that profession involves drugs, including controlled substances. We also appreciate Evans' efforts for the last three years in remaining drug free and pursuing her nursing career. The primary purpose of professional licensing is to protect the public.¹¹ Evans has been subject to probation since November 19, 2012. Based on the testimony, we believe the public will be protected by a

¹⁰ *State Bd. of Regis'n for the Healing Arts v. Trueblood*, 368 S.W.3d 259 (Mo. App., W.D. 2012).

¹¹ *Lane v. State Comm. of Psychologists*, 954 S.W.2d 23, 25 (Mo. App., E.D. 1997).

9-month probationary period under the conditions set forth in the Board's order, from when she was licensed on November 19, 2012.

Summary

We sustain the Board's decision to issue a probated license to Candice Evans, but reduce the period of probation to 9 months.

SO ORDERED on August 2, 2013.

\s\ Nimrod T. Chapel, Jr.
NIMROD T. CHAPEL, JR.
Commissioner